89-933

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOHN CARPENTER,
COUNTY OF SANTA BARBARA,
Petitioners,
vs.
JAMES D. THOMAS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a sheriff may take nondisciplinary action against a member of his own department who unsuccessfully challenged him in an election without violating the First Amendment?

PARTIES TO THE PROCEEDING

All parties are listed in the caption.

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PETITION FOR WRIT OF CERTIORARI

The petitioners John Carpenter and the County of Santa Barbara respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on August 9, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 881 F.2d 828, and is attached hereto as Appendix A.

The memorandum decision of the United States District Court for the Central District of California (Williams, D.J.) has not been reported. It is attached hereto as Appendix B.

JURISDICTION

Respondent brought suit against petitioner under the provisions of 42 U.S.C. § 1983, when he filed his complaint for damages in the United States District Court for the Central District of California on March 16, 1988. Jurisdiction of the district court was invoked pursuant to 28 U.S.C. §§ 1343 and 2201.

On September 12, 1988, the district court issued an order dismissing respondent's complaint with prejudice and granting petitioners' motion to dismiss for failure to state a claim, filed pursuant to Federal Rule of Civil Procedure 12(b)(6). Judgment on that order was entered on September 14, 1988.

Respondent appealed to the United States Court of Appeals for the Ninth Circuit, invoking appellate jurisdiction under 28 U.S.C. § 1291.

On August 9, 1989, the United States Court of Appeals for the Ninth Circuit entered a judgment and an opinion reversing the Central District's order of dismissal. See, App. p. A-1, *infra*. No petition for rehearing was sought by petitioners.

On November 1, 1989, Justice O'Connor ordered that the time for filing this petition for writ of certiorari be extended to and including December 7, 1989.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment, United States Constitution:

Congress shall make no law . . . abridging the freedom of speech. . .

United States Code, Title 42, Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner John Carpenter has held the elected office of Sheriff of Santa Barbara County since 1970.

Respondent James D. Thomas was hired by the Santa Barbara Sheriff's Department in 1973. Thomas has been a lieutenant in the sheriff's office since 1982. App. p. A-4.

The incidents giving rise to the lawsuit filed in the instant action began in December of 1985, when Thomas challenged Carpenter for the sheriff's position in the

upcoming June, 1986, election. During the course of his campaign, Thomas made statements that concerned the internal management of the sheriff's department, the managerial skills of petitioner Carpenter, and made further remarks challenging Carpenter's commitment to the sheriff's department.

In the June, 1986, election, Carpenter prevailed and was therefore reelected as Sheriff of Santa Barbara County. App. p. A-4.

Since that time, up to and including the time of the filing of this petition, respondent Thomas has not been terminated, transferred, or demoted. In fact, Thomas admitted in his complaint that petitioner Carpenter or the County of Santa Barbara has never initiated disciplinary proceedings against him. App. p. A-4.

In his suit for damages, Thomas alleged that certain nondisciplinary actions taken by petitioners impermissibly violated his First Amendment rights of free speech and political association.

The actions Thomas alleged as unconstitutional are his prohibition from the following:

1. Attendance at departmental meetings, in which Thomas was "sitting in" for an absent superior officer;
2. Participation on the department's policy manual revision committee;
3. Service as a training evaluator of other sheriff's department deputies.

None of these functions falls within the designated duties of a lieutenant in the Santa Barbara County Sheriff's Department.

In dismissing respondent's complaint, the district court noted that Thomas had never lost any portion or

function of his employment to which he had a given right. App. p. B-7.

The Ninth Circuit challenged and disagreed with this contention, holding essentially that regardless of Thomas' entitlement, no action could be taken in derogation of his First Amendment rights. App. pp. A-5, A-6. From that opinion and judgment, this petition is now taken.

REASONS FOR GRANTING THE WRIT

1. THE NINTH CIRCUIT'S DECISION IMPERMISSIBLY EXTENDS LIABILITY BEYOND THE LIMITS OF CURRENT CONSTITUTIONAL JURISPRUDENCE AND CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

The court below added conflict and confusion to an already unclear area of the law when it reversed the district court's dismissal of respondent's action. The error below is twofold. First, in finding that nondisciplinary action taken by a public employer represents actionable conduct, the Ninth Circuit stepped beyond accepted boundaries decided by this Court and other circuits. This represents error in result.

Second, the court, in reversing the dismissal, failed to recognize the substantial weight given to police agencies in making employment decisions to ensure an effective provision of law enforcement services. By creating a distinction without substance, the court avoided making the proper balancing inquires, inquiries which, as a matter of law, resolve in favor of the nondisciplinary

action taken against respondent. This represents error in procedure.

Combined, this multi-faceted error creates more than just an incorrect decision in the instant case; it sets an unsupported precedent in the area of both first amendment and employer-employee law. This "precedent" conflicts with other circuits and in part, with the decisions of this Court.

Finally, this Court has not spoken to the issues raised by this petition. In order to secure uniformity and guidance in important cases involving these substantial issues, the Court should grant petitioners' request for certiorari.

A. The Decision Below Expands Liability by Allowing a Suit for Damages Based on Non-Disciplinary Action

While it is a well-settled proposition that public employees do not surrender their rights to free speech by accepting employment (*Perry v. Sinderman*, 408 U.S. 593 (1972)), it is equally well-settled that public employers are not helpless to promote the efficient running of government. (*Pickering v. Board of Education*, 391 U.S. 563 (1968)).

In *Thomas*, the Ninth Circuit did acknowledge that respondent was neither terminated, demoted or transferred. App. p. A-5. However, the court felt that it was of "no consequence" that the actions taken by Carpenter did not amount to such treatment. App. p. A-5. Other courts have not so held.

In *Bennis v. Gable*, 823 F.2d 723 (3d Cir. 1987), the Third Circuit held that First Amendment protections are

indeed implicated whenever a government employee is disciplined for his speech. In so holding, the Third Circuit noted that termination was not the only form of actionable conduct. In analyzing the conduct, a reviewing court is to look "not in the harshness of the sanction applied, but in the imposition of any *disciplinary* action for the exercise of permissible free speech." 823 F.2d at 731 (emphasis added).

The key difference between the Third Circuit's decision in *Bennis* and the Ninth Circuit's decision in *Thomas* concerns the type of action taken.

While *Bennis* holds that any *discipline*, albeit in the form of a transfer, demotion, or even outright termination, represents potential actionable conduct, the Ninth Circuit goes much further. Under the ruling in *Thomas*, nondisciplinary action is now actionable. Thomas pleaded and admitted that he was never the victim of any disciplinary action undertaken by Sheriff Carpenter or the County of Santa Barbara. *Bennis* draws the line at disciplinary action, while the *Thomas* court blurs that line with the use of the catch-all term "retaliation." App. p. A-6.

Moreover, the cases cited by the Ninth Circuit in support of this blurred distinction do not approve such an extension of liability; they merely reflect the settled proposition that *disciplinary* action may represent actionable conduct, regardless of the severity of the discipline. *Allen v. Scribner*, 812 F.2d 426 (9th Cir. 1987), *modified*, 828 F.2d 1445 (9th Cir. 1987) represents a disciplinary transfer. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), involves a termination. *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891 (1987), *reh'g denied*, 483 U.S. 1056, 108 S.Ct. 31 (1987), involves a termination of a clerical employee. *Connick v. Meyers*, 461 U.S. 138

(1983) involves the outright dismissal of a deputy district attorney. In short, petitioners have located no cases indicating that nondisciplinary action, even if characterized as "retaliatory," impinges upon First Amendment protections as recognized by this Court and interpreted by other circuits.

Against this lack of authority is a concrete and well-formed policy consideration favoring the administration of government. Over time, this consideration has evolved into a balancing test between the rights of the individual and the necessity for a smooth running government. *Rankin v. McPherson*, 483 U.S. 378, 384, 107 S.Ct. 2891, 2896 (1987). This balancing test was all but overrun by the Ninth Circuit in their haste to consider petitioners' actions as "retaliatory."

Under the Ninth Circuit's new rule, "retaliatory" action, even if nondisciplinary, rises to the level of a constitutional violation. In so holding, the court minimized any policy considerations for the effective running of a police force.

In light of the lack of support and the impermissible extension of liability based on narrower interpretations in other circuits, the balance must now shift in favor of petitioners. Given the prior decisions of this Court and other circuits, ending liability at the disciplinary stage, review of the *Thomas* decision is necessary in order to promote a clear reading of First Amendment law to all courts and all parties.

B. In Failing to Examine the *Elrod* Line of Cases, the Ninth Circuit Creates Conflicting Distinctions Without Substance

In the courts below, petitioners cited to the political affiliation cases of *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), contending that if discharge of policymakers is permissible, then *a fortiori* the refusal to allow respondent to affect the policies of the department must also be permissible.

The Ninth Circuit all too briefly dismissed petitioners' citation to the *Elrod-Branti* standard, holding those cases inapposite because the office of Sheriff of Santa Barbara County is nonpartisan. App. p. A-8.

In *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989), the appellate court upheld a Rule 12(b)(6) dismissal of a civil rights complaint brought by discharged members of a sheriff's department. The *Terry* court found that the *Elrod-Branti* line of cases did apply to the facts of the case, holding that the loyalty required of any deputy is great enough to warrant discharge for failing to support the incumbent sheriff. *Terry*, 866 F.2d at 377.

The court in *Terry* was not bound by any distinction between partisan and nonpartisan politics, holding that "the closeness and cooperation required between sheriffs and their deputies necessitates the sheriff's absolute authority over their appointment and/or retention." *Id.*

The question of requisite loyalty was determined *as a matter of law*, without party affiliation entering the analysis. In further support of this application, and in further conflict with the Ninth Circuit's decision, is the Fifth Circuit's holding in *Tanner v. McCall*, 625 F.2d 1183 (5th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981)

("it was never contemplated that the sheriffs of the state must perform the powers and duties vested in them through deputies or assistants selected by someone else.")

This idea concerning the need for a loyal police force is neither new nor unsettled.

In *Mysinger v. Foley*, 651 F. Supp. 328 (W.D. Ark. 1987), the district court was presented with a case where *discharged* sheriff's deputies brought a civil action claiming the discharge was an unconstitutional retaliation for political activity.

While grudgingly finding a violation, the judge criticized the existing circuit precedent, observing that:

> The court has little doubt but that the plaintiffs were not supportive of the sheriff, and intended to do their part to see that he was not re-elected . . . It does not seem 'fair' to require the sheriff to retain employees who intend to work against him with the desire that either they or someone they support will 'beat him' in the coming election.

Mysinger, 651 F. Supp. at 329.

The *Mysinger* court's frustration is mirrored by the County of Santa Barbara, who must now, through its sheriff, continually expose Thomas to policies for which he has little or no support.

C. The Ninth Circuit's Incorrect Application of Settled Balancing Tests Creates Conflict in Employee Speech Cases

In *Joyner v. Lancaster*, 815 F.2d 20 (4th Cir. 1987), *cert. denied*, 484 U.S. 830, 108 S.Ct. 102 (1987), a captain in the sheriff's department brought an action against the county and sheriff alleging that he was discharged in violation of his First Amendment rights. The captain openly supported a candidate running against the incumbent and current sheriff.

On review, the Fourth Circuit affirmed the lawfulness of the discharge. The *Joyner* court, citing to *Connick v. Meyers*, 461 U.S. 138 (1983), synthesized the balancing test used:

> [T]he court must consider whether or not the speech implicated is a matter of public concern. If a matter of public concern was implicated, the court must consider whether the employee's interest in the speech was outweighed by the employer's interest in the effective and efficient fulfillment of its responsibilities to the public.

Joyner, 815 F.2d at 23.

The court then noted that the outcome of the balancing test is a question of law for the court, not a question of fact for resolution by a fact finder. *Joyner*, 815 F.2d at 23.

Beginning its balancing, the court found that like Thomas, the plaintiff was involved in planning, reviewing and evaluating the work of deputy sheriffs.

Analyzing the interests of the employee, the court found wide ranging considerations based on the professions of the public employees involved:

> Non-policy-making employees can be arrayed on a spectrum, from university professors at one end to policemen at the other. State inhibition of academic freedom is strongly disfavored . . . In polar contrast is the discipline demanded of, and freedom correspondingly denied to policemen.

Joyner, 815 F.2d at 23.

In noting the distinction, the *Joyner* court holds exactly opposite of the *Thomas* court, on ostensibly the same facts.

Like Joyner, Thomas was in a position between line officers and policymakers such as the sheriff. By his allegations, Thomas was clearly involved in policy-making or policy-implementing functions *outside* of his duties as lieutenant in the sheriff's department. He allegedly performed policy manual revisions, and like the plaintiff in *Joyner*, evaluated other deputies. Thomas' claim that he participated in "informational" departmental staff meetings implies that he disseminated that information and thus performed as a link between the sheriff and the deputies whom he supervised. This fact pattern is almost exactly analogous to the situation in *Joyner*, yet a far different result is reached.

Thomas cannot be squared with *Joyner*. From this conflict, no clear guidance for future conduct can be gained, thereby necessitating the intervention of this Court to determine the proper path to take.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment of the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES D. THOMAS, *Plaintiff-Appellant,* v. JOHN CARPENTER, *Defendant-Appellee.*	No. 88-6507 D.C. No. CV-88-1378-DWW OPINION

Appeal from the United States District Court
for the Central District of California
David W. Williams, District Judge, Presiding

Argued and Submitted
June 7, 1989—Pasadena, California

Filed August 9, 1989

Before: Procter Hug, Jr., Cynthia Holcomb Hall and Charles Wiggins, Circuit Judges.

Opinion by Judge Wiggins

SUMMARY

Constitutional Law

Reversing the district court's judgment of dismissal for failure to state a claim, the court held that a complaint that alleges state action motivated by an intent to retaliate for the exercise of constitutionally protected rights satisfies the requirements of 42 U.S.C. § 1983.

Appellant James Thomas, a Lieutenant for Santa Barbara County's Sheriff's Department, challenged appellee incumbent sheriff John Carpenter in an election for that office. Thomas's campaign literature focused on Carpenter's commitment and competence. Thomas lost, and after the election, Carpenter banned Thomas from attending departmental staff meetings, policy revision meetings, and participating as an evaluator for the department's high risk entry team. Thomas was the only Lieutenant singled out for exclusion, purportedly in retaliation for his campaign against Carpenter.

[1] A cause of action under section 1983 requires plaintiff to plead that defendant acting under color of state law deprived plaintiff of constitutionally protected rights. [2] All that Thomas's complaint needs to avoid dismissal are allegations that Carpenter's conduct was motivated by an intent to retaliate for his exercise of constitutionally protected rights. [3] Whether an employee's conduct is constitutionally protected necessarily involves balancing the interests of the employee as a citizen in commenting on matters of public concern and the interest of the State as employer in promoting the efficiency of the public services it performs through its employees. [4] There is no doubt that Thomas's allegations, taken as true, satisfy the threshold inquiry. The form of speech was literature disseminated widely in the context of a political campaign. [5] Carpenter cannot show, based solely on Thomas's complaint, that Thomas's political loyalty is essential to the effective performance of the tasks removed from Thomas's list of responsibilities. Carpenter may be able to prove this at trial, or even by summary judgment, but at the pleading stage, Carpenter cannot satisfy this burden.

COUNSEL

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Eric S. Oto, Cotkin, Collins & Franscell, Los Angeles, California, for the defendant-appellee.

OPINION

WIGGINS, Circuit Judge:

We must consider in this case the right of a public employee to seek election to the position occupied by his supervisor, free from retaliatory action against him when he fails. Under the circumstances of this case, we hold that the public employee states a cause of action.

I

Appellant James D. Thomas, a Lieutenant for the County of Santa Barbara Sheriff's Department, appeals from the district court's dismissal of his second-amended complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. Thomas's complaint alleges civil rights violations against the County of Santa Barbara and its sheriff, John Carpenter, and seeks both injunctive relief and compensatory and punitive damages under 42 U.S.C. § 1983 (1982). The district court dismissed the complaint with prejudice, concluding that Carpenter's alleged conduct as a matter of law did not violate Thomas's constitutional rights. We have jurisdiction of Thomas's timely appeal under 28 U.S.C. § 1291 (1982).

A dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) is a ruling on a question of law and as such is reviewed de novo. *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986). We cannot uphold such a dismissal "unless it appears to a certainty that the plaintiff would not be entitled to relief under any set of facts that could be proved. All material allegations in the complaint are to be taken as true and

construed in the light most favorable to the non-moving party." *Id.*

The material allegations in Thomas's complaint are as follows. Thomas has been employed by the Santa Barbara Sheriff's Department since 1973. He attained the position of Lieutenant in 1982. A Lieutenant is defined by the department's policy and discipline manual as a "subexecutive" whose duty is to "carry out department policies and administer and supervise the work of various subdivisions." As a Lieutenant, Thomas is not responsible for developing departmental policy, and therefore he, like any other employee, can only recommend policy changes through the designated chain of command. During his tenure as Lieutenant, Thomas had attended over 100 departmental staff meetings in the absence of his Division Commander, attended departmental policy manual revision meetings in conjunction with other Lieutenants in the department, and participated as an evaluator in training exercises for the department's high risk entry team.

In 1986 Thomas challenged Carpenter, the incumbent sheriff, in the June election for that office. Thomas's campaign literature focused on Carpenter's commitment to the sheriff's department and challenged his competence in running an efficient law enforcement agency. Carpenter won the election, receiving 54% of the vote to Thomas's 46%. After the election, Carpenter banned Thomas from attending departmental staff meetings, from attending policy manual revision meetings, and from participating as an evaluator for the department's high risk entry team. Thomas is the only Lieutenant in the department singled out for exclusion, purportedly in retaliation of his campaign against Carpenter for the office of Sheriff. Carpenter asserts that he took these steps because of Thomas's disloyalty and untrustworthiness, but he has not formerly charged Thomas in any departmental disciplinary proceedings. Carpenter's conduct is alleged to have diminished Thomas's professional reputation so that he has lost promotional opportunities within the department and

lateral opportunities with other law enforcement agencies in California. He seeks general damages, punitive damages, and injunctive relief.

II

[1] " 'To make out a cause of action under section 1983, plaintiffs must plead that (1) the defendants acting under color of state law (2) deprived plaintiffs of rights secured by the Constitution or federal statutes.' " *Soranno's Gasco, Inc. v. Morgan*, No. 87-2249, slip op. 5095, 5101-02 (9th Cir. May 15, 1989) (quoting *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987)). The district court concluded that Thomas's allegations failed to meet the second of these two elements. The district court reasoned that Thomas was not deprived of any protected right because he "was neither terminated nor demoted nor transferred," and he "had no given right to attend policy-making meetings."

[2] Underlying this rationale is the notion that dismissal was proper because Thomas failed to allege a constitutionally protected property interest. But such allegations are unnecessary under the theory of Thomas's claim. Because "[s]tate action designed to retaliate against and chill political expression strikes at the heart of the First Amendment," *Gibson*, 781 F.2d at 1338, all that Thomas's complaint needs so as to avoid dismissal are allegations that Carpenter's conduct was motivated by an intent to retaliate for his exercise of constitutionally protected rights, *see Soranno's Gasco, Inc.*, slip op. at 5102 n.3 ("The fact that he had no protected property interest in continued employment was not dispositive because his firing, if retaliatory, effectively deprived him of his constitutionally protected right to free speech."). It is therefore of no consequence that, as Thomas alleges, Carpenter chose to remove certain responsibilities from his usual duty assignments instead of terminating, demoting, or transferring him. *See Allen v. Scribner*, 812 F.2d 426, 434 n.16 (9th Cir. 1987)

("If Allen reasonably felt that office work was less desirable than field work, his reassignment might have had an impermissible chilling effect on his constitutionally protected speech," even if the tasks "were commensurate with his training and experience."), *modified*, 828 F.2d 1445 (9th Cir. 1987); *cf. Elrod v. Burns*, 427 U.S. 347, 359 n.13 (1976) (conduct used to discourage the exercise of first amendment freedoms "need not be particularly great in order to find that rights have been violated"; for example, "[r]ights are infringed both where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason").

The crux of this case, then, rests on whether Thomas's complaint sufficiently alleges that Carpenter acted with an intention of retaliating against the exercise of constitutionally protected rights. Carpenter does not challenge Thomas's allegations that the "substantial" or "motivating" factor of his decisions banning him from certain duties was because of Thomas's candidacy for Sheriff. *See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-86 (1977) (after plaintiff satisfies his burden of showing that the defendant's conduct was motivated by his exercise of a constitutional right, the burden shifts to the defendant to establish that the decision would have been no different even in the absence of the protected conduct). Instead, Carpenter contends that Thomas's campaign against him is not constitutionally protected.

[3] Whether a public employee's conduct is constitutionally protected necessarily involves balancing " 'the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " *Rankin v. McPherson*, 107 S. Ct. 2891, 2896 (1987) (quoting *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)). "The threshold question in applying this balancing test is whether [Thomas's] speech may be

'fairly characterized as constituting speech on a matter of public concern.' " *Id.* at 2896-97 (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983)). This inquiry is "determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 2897 (quoting *Connick*, 461 U.S. at 147-48).

[4] There is no doubt that the allegations of Thomas's complaint, taken as true, satisfies this threshold inquiry. The content of Thomas's speech was to challenge Carpenter's commitment to the Sheriff's department and his competence in running an efficient law enforcement agency. *Cf. McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983) ("the competency of the police force is surely a matter of great public concern"). The form of the speech was literature disseminated widely throughout the County of Santa Barbara. And, of great significance, the statements occurred in the context of a political campaign. The content, form, and context of these statements clearly satisfy the threshold requirement even under the most exacting of views of what kinds of statements involve matters of public concern. *See Rankin*, 107 S. Ct. at 2902 (Scalia, J., dissenting) (speech on matters of public concern include "those matters dealing in some way with 'the essence of self government,' matters as to which 'free and open debate is vital to informed decisionmaking by the electorate,' and matters as to which ' "debate . . . [must] be uninhibited, robust, and wide-open" ' " (citations omitted)).

Balanced against Thomas's interest in speaking on these matters of public concern is the public employer's interest "in promoting the efficiency of the public services it performs through its employees." *Id.* at 2898 (majority opinion). The focus of this part of the inquiry is on whether the protected conduct disrupts "the effective functioning of the public employer's enterprise." *Id.* at 2899. Factors to consider are "whether the statement impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loyalty and

confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Id.* Where, as here, the challenged speech deals more directly with issues of public concern, the public employer is "required to make an even 'stronger showing' of disruption." *McKinley*, 705 F.2d at 1115.

"Exactly what that 'stronger showing' entails is unclear," *Allen*, 812 F.2d at 432, and even varies depending on the context of the situation. "[A] police department," for example, "ordinarily will not be governed by the same standard as a school district" because of the " 'differences between the public interest in education and the public interest in safety.' " *Id.* (quoting in part *Byrd v. Gain*, 558 F.2d 553, 554 (9th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978)). Carpenter argues that these safety concerns tip the balance in his favor and therefore Thomas's conduct was not constitutionally protected. "Yet even in a police department, the complained-of disruption must be 'real, [and] not imagined.' " *Id.* (quoting *McKinley*, 705 F.2d at 1115). Here, the clear import of Thomas's allegations is that his campaign against Carpenter did not impede his ability to perform his job or interfere with the safety responsibilities of the department. Simply stated, then, Carpenter cannot use the disruption exception " 'as a pretext for stifling legitimate speech or penalizing [Thomas's expression of] unpopular views.' " *Id.* (quoting *McKinley*, 705 F.2d at 1115).

Carpenter also relies on the political affiliation cases of *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), to argue that he could justifiably exclude Thomas from any policy making role on the department solely on account of Thomas's being his political adversary. *See also Soderbeck v. Burnett County*, 752 F.2d 285, 288 (7th Cir.), *cert. denied*, 471 U.S. 1117 (1985). *Elrod* and *Branti* are not directly on point because they address political patronage dismissals based upon party loyalty. The election between Thomas and Carpenter, however, was nonpartisan. Nonethe-

less, "[t]he *Elrod-Branti* line is premised upon concerns similar to those animating the employee speech cases." *Hall v. Ford*, 856 F.2d 255, 262 (D.C. Cir. 1988). Accordingly, "the government interest recognized in the affiliation cases is also relevant in the employee speech cases." *Id.* at 263. The interest advanced by Carpenter's argument is the "need for political loyalty of employees, not to the end that effectiveness and efficiency be insured, but to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." *Elrod*, 427 U.S. at 367. This interest is not furthered, however, by the discharge of nonpolicymaking individuals who "have only limited responsibility and are therefore not in a position to thwart the goals of the in-party." *Id.*

It simply cannot be decided on the basis of Thomas's complaint that he would be in a position to thwart the goals of the in-party. As noted in *Elrod*,

> No clear line can be drawn between policymaking and nonpolicymaking positions. While nonpolicymaking individuals usually have limited responsibility, that is not to say that one with a number of responsibilities is necessarily in a policymaking position. The nature of the responsibilities is critical. Employee supervisors, for example, may have many responsibilities, but those responsibilities may have only limited and well-defined objectives. An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position. In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals.

Id. at 367-68. Even this formula is not all encompassing. "[T]he ultimate inquiry," the Court announced later in

Branti, "is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518.

[5] Carpenter cannot show, based solely on the allegations of Thomas's complaint, that Thomas's political loyalty is essential to the effective performance of the tasks removed from his list of responsibilities. Thomas alleges that the weekly staff meetings are informational only and do not involve the formulation of departmental policy. Also, it seems patent that the role of evaluator of the department's high risk entry team has no significant relationship to one's political loyalty. The effect of Thomas's participation in policy manual revision meetings is much less clear. Carpenter may be able to prove at trial, or perhaps even by summary judgment, that Thomas's political loyalty in each of these positions is needed for the effective implementation of general departmental policy. *Compare Roth v. Veteran's Admin. of Government of U.S.*, 856 F.2d 1401, 1408 (9th Cir. 1988) (requiring trial on government's defense that employee's speech disrupted the office) *with Balogh v. Charron*, 855 F.2d 356, 357 (9th Cir. 1988) (affirming summary judgment based upon bailiff's status as a confidential employee). At the pleading stage, however, Carpenter cannot satisfy this burden. *Cf. Soderbeck*, 752 F.2d at 288 (whether employee could be fired based on political affiliation "was sufficiently uncertain to be one for the jury to decide").

III

Because Thomas's complaint states a claim under section 1983, we reverse the district court and remand for additional proceedings. Thomas is entitled to costs of this appeal. However, a claim for attorneys' fees is premature and must await the ultimate determination of the prevailing party. *See Hanrahan v. Hampton*, 446 U.S. 754, 756 (1980).

REVERSED AND REMANDED.

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APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAMES D. THOMAS,
Plaintiff,
vs.
JOHN CARPENTER and the
COUNTY OF SANTA BARBARA,
Defendants.

Case No. 88-1378 DWW (JRx)
ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

This motion came on to be heard on defendants' motion to dismiss the amended complaint.

Plaintiff, James D. Thomas ("Thomas"), filed an action against John Carpenter ("Carpenter") in his capacity as the elected Sheriff of the County of Santa Barbara and the County of Santa Barbara ("the County"), alleging that both his federal and state constitutional rights were violated in his assignment of and exclusion from the duties of the sheriff's office. Thomas has been a lieutenant in the sheriff's office since November, 1982. He has worked for the County since 1973. In December of 1985, Thomas challenged Carpenter in the June, 1986, sheriff election. The election was held and Carpenter was re-elected as sheriff, receiving 54 percent of the vote. Thomas received approximately 46 percent of the vote.

Subsequent to the election, Thomas alleges that he began to be excluded from normal staff and office meetings. He alleges that he received a memo from Carpenter in one instance informing him that he would

no longer be allowed to attend departmental meetings (or departmental manual revision meetings) which he had attended for years. He was also not allowed to attend staff meetings in his captain's absence as other lieutenants were allowed to do.

On November 5, 1987, Thomas requested the Santa Barbara County Civil Service Commission ("the Commission") to investigate what Thomas believed was retaliation by Carpenter for Thomas running against him for elective office. A written response was issued by Undersheriff Vizzolini which Thomas found convincing for his argument that the behavior was election-related. Meanwhile, the commission decided that its investigation was not the proper action and ordered that a disciplinary or discrimination hearing be granted. Mr. Nye, a hearing officer, was appointed. However, the hearing was dismissed on Carpenter's motion. Thomas claims that these incidents combined to deprive him of his right to free speech, association and assembly, the [illegible]t of liberty and personal security, and rights guarant[illegible]d by the California Constitution. Thomas seeks injunctive and declaratory relief and punitive damages. He prays for relief as follows (and demands a jury trial):

1. Compensatory and general damages in an amount according to proof.
2. Punitive damages against Carpenter in an amount according to proof.
3. Injunctive relief.
4. Declaratory relief.
5. Reasonable attorney's fees incurred.
6. Costs of suit.
7. Such other and further relief as the court deems proper.

On June 7, 1988, defendants moved the court for an order dismissing the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, alleging that plaintiff had failed to allege causes of action upon which relief could be granted. The court granted the motion with leave for plaintiff to amend the Complaint. On June 22, 1988, plaintiff submitted a Second Amended Complaint. Defendants now move the court for an order dismissing the Second Amended Complaint.

In bringing a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the burden of showing that no claim has been stated is upon the moving party.[1] In assessing the motion, the court presume all factual allegations of the complaint to be true and all reasonable inferences are made in favor of the non-moving party, but legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness.

The court must then determine whether "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." In making the determination, the likelihood that plaintiff will prevail is immaterial as is the fact that the requested relief is inappropriate, or the legal theories have been miscategorized.

The elected office of Santa Barbara County Sheriff is non-partisan.[2] State and local laws prohibit retaliation

---

1 *Johnsrud v. Carter*, 620 F.2d 29 (9th Cir. 1981).

2 California Constitution, Article II, § 6 provides in pertinent part that:

> (a) All judicial, school, county and city offices shall be non-partisan;
>
> (b) No political party or party's central committee may endorse, support, or oppose a candidate for a non-partisan office.

against an individual for his political affiliations in campaigning for the elected office of sheriff.[3] California statutes prohibits discrimination or retaliation against an individual seeking election for a public office. California Labor Code § 1101 provides that:

> No employer shall make, adopt or enforce any rule, regulation, or policy:
>
> (a) forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office;
>
> (b) controlling or directing, *or tending to control or direct the political activities or affiliation of employees.* [emphasis added]

California Labor Code § 1102 provides that:

> No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular

---

[3] See, the Code of the County of Santa Barbara, California, which provides in pertinent part:

> Sec. 27-29.
>
> . . . any county employee or officer may seek appointment of election to any public position, office or employment for which he is qualified.
>
> Sec. 27-30.
>
> No person in the classified service . . . shall be appointed, promoted, reduced, or removed, or in any way favored or discriminated against because of his . . . political affiliations . . . or other non-merit factors . . . Persons alleging discrimination prohibited by this section may appeal to the civil service commission as provided by the rules.

> course or line of political action or political activity.

California Government Code § 3302(a) states that:

> Except as otherwise provided by law, or whenever on duty or in uniform, *no public safety officer shall be prohibited or engaging, or be coerced or required to engage in, political activity.* [emphasis added]

Defendants do not dispute that Thomas' exclusion from the departmental (and other) meetings is due to his participation in the sheriff elections the previous year. Defendants claim that the action of campaigning gave rise to mistrust and a lack of confidence. They maintain that their actions in excluding him did not violate his federal or state constitutional rights, in accordance with *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976).

In *Elrod*, the Supreme Court reviewed actions taken by a newly elected sheriff against existing employees. The petitioners brought suit seeking injunctive relief as well as damages for civil rights violations when they were dismissed. The District Court denied a preliminary injunction because of plaintiffs' failure to show irreparable injury and dismissed the complaint for failure to state a claim upon which relief could be granted. The United States Court of Appeals for the Seventh Circuit reversed and remanded, holding that the complaint stated a legally cognizable claim and instructed the district court to enter appropriate preliminary injunctive relief.

The Supreme Court affirmed, although unable to agree on an opinion. Three Justices are of the opinion that patronage dismissals, which severely restrict freedom of political belief and association, cannot be justified as necessary to (a) insure effectiveness and efficiency of government and public employees, (b) protect

representative government from being undercut by tactics of employees in obstructing the implementation of a new administration's policies that were sanctioned by the electorate, since limiting patronage dismissals to policy-making positions is sufficient to achieve governmental end, or (c) preserve the democratic process through assisting partisan politics. Two of the justices opined that a non-policy-making, non-confidential government employee cannot be discharged from a job that he is satisfactorily performing upon the sole ground of his political beliefs. (Justices Burger, Rehnquist, and Powell dissenting.)

Defendants argue that *Elrod* simply allows the dismissal of individuals who are in a policy-making position (and insist that Thomas is in such a position). They point to a statement made by Justice Brennan:

> Representative government [should] not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate.

427 U.S. at 367.

Defendants suggest that by running for a non-partisan position against the current sheriff plaintiff effectively eliminated his ability to objectively implement policy in the sheriff's office and that he cannot now be trusted to be "loyal" to the objectives of the office. The *Elrod* Court did hold that "consideration should also be given to whether the employee acts as an advisor or formulates plans for the implementation of broad policy."

Similarly, Thomas has not lost his job in the instant matter, he has simply been relieved of some of his policy-making responsibilities.

Defendants also cite *Soderbeck v. Burnett County*, 752 F.2d 285 (7th Cir. 1985), citing *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), which acknowledged that there are exceptions to the rule that a public agency that fires an employee because of his political affiliations infringes his freedom of speech. The same exception that defendants find in *Elrod*, the "policy-maker's exception," is noted. However, the *Soderbeck* court held that the policy-making employee may be fired only if the hiring authority can demonstrate the party affiliation is an appropriate requirement for effective performance of the *political office* involved. [emphasis added] [4] Defendants do not argue such facts, but they imply that Thomas' affiliations precluded his effectiveness in the work environment in which he had been functioning.

Plaintiff has cited the recent case of *Johnson v. Koppes*, 850 F.2d 594 (9th Cir. 1988). This case is not of help to plaintiff. It upholds the right of assembly and the right to petition the government. It should be remembered that in the case at hand, Thomas was neither terminated nor demoted nor transferred. He had no given right to attend policy-making meetings. He attended only as an alternative for a superior officer in the event the latter was unavailable to attend. I conclude that Sheriff Carpenter had a justifiable reason to ban Thomas from attending meetings where policy is made and that the reasons are non-violative of any of Thomas' constitutional rights.

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[4] Although the cases cited are dismissal actions, we extrapolate to include retaliatory actions and actions that are "constructive dismissal" as are those in the instant action.

Defendants' motion is granted and the complaint is ordered dismissed with prejudice.

IT IS SO ORDERED.

Dated this 7th day of September, 1988.

DAVID W. WILLIAMS,
District Judge

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

JOHN CARPENTER, COUNTY OF SANTA BARBARA,
Petitioners,

vs.

JAMES D. THOMAS,
Respondent.

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

Donald A. Johnson, being first duly sworn, deposes and says: I am a citizen of the United States and a resident of or employed in the county aforesaid. I am over the age of 18 years and not a party to the said action. My business address is 3550 Wilshire Boulevard, Suite 916, Los Angeles, California 90010. On this date, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action by placing three true copies thereof with first-class postage fully prepaid, in the United States post office mailbox at Los Angeles, California, in sealed envelopes addressed as follows:

GEORGE W. SHAEFFER, JR.
SILVER, KREISLER, GOLDWASSER
& SHAEFFER
1201 Dove Street, Suite 600
Newport Beach, CA 92660

That affiant makes this service, for ANTHONY P. SERRITELLA, Counsel of Record, COTKIN, COLLINS & FRANSCELL, Attorneys for Petitioners herein, and that to the best of my knowledge all the persons required to be served in said action have been served.

Donald A. Johnson

On December 7, 1989, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Donald A. Johnson, known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

Witness my hand and official seal.

Notary Public in and for
said county and state

No. 89-933

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

JOHN CARPENTER,
COUNTY OF SANTA BARBARA,

Petitioners,

vs.

JAMES D. THOMAS,

Respondent.

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Has Thomas stated a viable §1983 claim for violation of First Amendment rights in alleging that Thomas suffered adverse personnel actions caused by Carpenter for expression on matters of public concern during the Sheriff's election.

2. Is political loyalty a permissable consideration in determining whether a public employee covered by a civil service system can be subjected to adverse personnel action in retaliation for the employee's campaign activities against his supervisor.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

JOHN CARPENTER, COUNTY OF SANTA BARBARA,
Petitioners

v.

JAMES D. THOMAS, Respondent

BRIEF IN OPPOSITION

The Respondent, James D. Thomas, respectfully requests this Court to deny the Petition for Writ of Certiorari, seeking review of the Ninth Circuit's Opinion in this case. The Opinion is reported at 881 F.2d 828 (9th Cir. 1989).

ADDITIONAL STATUTES INVOLVED

5 U.S.C. §7324:

This section is reprinted in the appendix hereto, p. 1a, infra.

Article II, §6(a), (b), California Constitution:

This section is reprinted in the appendix hereto, p. 2a, infra.

California Government Code §3202(a):

This section is reprinted in the appendix hereto, p. 2a, infra.

California Government Code §3203

This section is reprinted in the appendix hereto, p. 3a, infra.

California Government Code §3302(a):

This section is reprinted in the appendix hereto, p. 3a, infra.

California Government Code §24000(a), (b):

This section is reprinted in the appendix hereto, p. 4a, infra.

California Government Code §24009(a):

This section is reprinted in the appendix hereto, p. 4a, infra.

California Labor Code §1101:

This section is reprinted in the appendix hereto, p. 4a, infra.

California Labor Code §1102:

This section is reprinted in the appendix hereto, p. 5a, infra.

Santa Barbara County Code §27-21:

This section is reprinted in the appendix hereto, p. 5a, infra.

Santa Barbara County Code §27-25(a)(1)(5):

This section is reprinted in the appendix hereto, p. 9a, infra.

Santa Barbara County Code §27-30:

This section is reprinted in the appendix

hereto, p. 10a, infra.

Santa Barbara Department Policy §1.206.1:

This section is reprinted in the appendix hereto, p. 11a, infra.

Santa Barbara Department Policy §1.207:

This section is reprinted in the appendix hereto, p. 11a, infra.

Santa Barbara Department Policy §1.211.1:

This section is reprinted in the appendix hereto, p. 13a, infra.

Exhibit 1 to Complaint:

This section is reprinted in the appendix hereto, p. 14a, infra.

Exhibit 3 to Complaint:

This section is reprinted in the appendix hereto, p. 15a, infra.

STATEMENT OF THE CASE

A. Statement of Facts.[1]

Respondent, James Thomas, (sometimes referred to as "Respondent" or "Thomas"), is a citizen of the State of California and a resident of the County of Santa Barbara, California. On or about July 15, 1973, Thomas was hired by the Santa Barbara's Sheriffs Department (hereinafter "Department"). Commencing in July of 1982, THOMAS became an acting lieutenant for Department. In November of 1982, Thomas was promoted to the position of Lieutenant; Thomas has continuously served in the capacity of lieutenant since that date. At

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[1] The statement of facts is discussed in the context that all material allegations in the complaint are to be taken as true and construed in the light most favorable to Thomas, the non-moving party in the Rule 12(b)(6) Motion to Dismiss. Scheuer v. Rhodes 416 U.S. 232, 236, 94 S.Ct. 1686, 40 L.Ed.2d 90 (1974).

all relevant times Thomas has had permanent status in the County's classified civil service system. (CR 15; Complaint ¶2).[2]

Petitioner, John Carpenter, (sometimes referred to as "Sheriff" or "Carpenter") is a citizen of the State of California residing in the County of Santa Barbara, California. Carpenter has held the elected county office of Sheriff since June 1970. (CR 15; Complaint ¶4).

In December of 1985, Thomas decided to challenge Carpenter in the June 1986 Sheriff election. Carpenter was re-elected as Sheriff in June of 1986. Carpenter received approximately 54% of the vote, and Thomas received approximately 46%

---

[2] The above citation is to docket number 15, paragraph 2 of the second amended complaint, found in Excerpts of Record filed with the Ninth Circuit. All subsequent references to the Excerpt will be in the same manner.

of the vote. (CR 15; Complaint ¶7).

Thomas alleges that he has been excluded from departmental staff meetings effective September 27, 1987, departmental manual revision meetings effective about March 15, 1988, and as an evaluator in training exercises by the Sheriff Department's high-risk entry team effective April 11, 1988. (CR 15; Complaint ¶¶ 10, 21, 24). Thomas alleges that he is the only lieutenant whom Carpenter has singled out for exclusion from these meetings or training exercises. (CR 15; Complaint ¶ 23). Thomas alleges that Carpenter's decision to exclude Thomas from the departmental staff meetings, the department manual revision meetings, and the training exercises is in retaliation for Thomas having run for public office against Carpenter for the office of Sheriff, and

public statements Thomas made during the campaign questioning Carpenter's management of the Sheriff's Department. (CR 15; Complaint ¶¶13, 25).

Thomas also alleges in the Complaint the Sheriff's purported justification for the exclusion of Thomas from the staff meetings: The Sheriff's lack of trust and confidence in Thomas, and the Sheriff's inability to trust Lt. Thomas' loyalty. (CR 15; Complaint ¶¶12, 15). Thomas denies that his campaigning for the elected office of Sheriff or any public statements made during the campaign concerning Carpenter justify Carpenter's claim of lack of confidence in Thomas, or Thomas is disloyal and untrustworthy. (CR 15; Complaint ¶17). Moreover, Thomas alleges that Carpenter has never initiated disciplinary proceedings against Thomas or disloyalty, lack of

confidence, untrustworthiness, or the disclosure of information communicated to Thomas during any staff meetings. (Id.) Thomas alleges that he has attended in excess of one hundred (100) staff meetings including three (3) meetings between the re-election of Carpenter in June of 1986 and September 25, 1987, the date Thomas was informed of his exclusion from the department staff meetings. (CR 15; Complaint ¶¶9,10). Thomas alleges that he has attended departmental manual revision meetings before when he was assigned to the Special Investigation Bureau. (CR 15; Complaint ¶20). Thomas alleges that he supervised the department's high-risk entry team for seven (7) years. (CR 15; Complaint ¶24).

Thomas alleges that he has lost promotional opportunities within the

Sheriff's Department and other promotional or lateral opportunities with other law enforcement agencies in California. (CR 15; Complaint ¶28). Finally, Thomas alleges that he has suffered general damages in the form of loss of professional reputation, and mental and emotional distress as a result of the conduct of Carpenter. (CR 15; Complaint ¶29).

REASONS FOR DENYING THE WRIT

I. The Court fully Considered and Correctly Decided All But One of the Issues in this Case Discussed in Argument II, supra.

A. Thomas has Sufficiently Alleged that he was Punished by Carpenter for Expression on matters of Public Concern which are Protected by the First Amendment.

In Mt. Healthy City Board of Eduction v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), the Court outlines an analysis for determining whether a public employee has a valid cause of action under 42 U.S.C. §1983 due to punishment for the exercise of his or her First Amendment Rights. First, the employee has the burden of showing that his conduct was constitutionally protected. Second, the employee has the burden of showing that his conduct was a "substantial factor" or a "motivating factor" in the adverse decision or action taken against the employee. Third, the employer has the burden of showing that the same adverse action would have been taken in the absence of the protected conduct. Id. at 287, 97 S.Ct. at 576. The Ninth Circuit followed the approach of Mt. Healthy and other

opinions from this Court in correctly deciding that Thomas' complaint sufficiently alleges Carpenter acted with the intention of retaliating against him for the exercise of constitutionally protected rights. See, Thomas v. Carpenter, supra at 830-31.

1. The expression of Thomas addressed matters of public concern and was protected by the First Amendment.

In Rankin v. McPherson ____U.S. ____, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987), and Connick v. Myers 564 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), the Supreme Court focused on the first step in the Mt. Healthy analysis in determining whether statements are constitutionally protected. The threshold issue is whether

the statements address a matter of public concern. Rankin v. McPherson, supra, 107 S.Ct. at 2896, Connick v. Myers, supra at 145, 103 S.Ct. at 1684. See, Thomas v. Carpenter, supra at 830. Accord, Allen v. Scribner, 812 F.2d 426, 430 (9th Cir. 1987), and McKinley v. City of Eloy 705 F.2d 1110, 1113 (9th Cir. 1983). Citing many cases from this Court, the Ninth Circuit stated in McKinley v. City of Eloy 705 F.2d 1110 (9th Cir. 1983): "It is axiomatic that 'speech concerning public affairs is more than self-expression; it is the essence of self-government'. [Citations]. As the Supreme Court has recently affirmed, speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values', and is entitled to special protection. [Citations]." Id. at 1113.

Once it is determined that the statements at issue address a matter of public concern, a Court is required to balance the interest of the employee as a citizen in commenting upon matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public service. Rankin v. McPherson, supra, 107 S.Ct. at 2898; Connick v. Myers, supra at 146-7; 103 S.Ct. at 1689-90. See, Thomas v. Carpenter, supra, 830-31.

The Supreme Court has not articulated a precise definition of what constitutes matters of "public concern". However, this Court has stated generally that the expression must relate "[t]o any matter of political, social, or other concern..." Connick v. Myers, supra, 103 S.Ct. at 1690. Further, the "content,

form, and context of the speech are relevant in the determination of whether the employee speech deals with an issue of public concern." Rankin v. McPherson, supra, at 2897; and Connick v. Myers, supra at 147-8, 103 S.Ct. at 1690-1. See, Thomas v. Carpenter, supra, and Allen v. Scribner, supra at 430. If it is clear that speech deals with individual personnel disputes and grievances, the information would have no relevance to the public evaluation of the performance of governmental agencies; such comments can be characterized as not of "public concern". McKinley v. City of Eloy, supra at 1114, citing Connick.

Finally, a relevant factor to consider in the balancing process once the threshold issue has been answered in the affirmative is whether the employer can establish the statements disrupted the

close working relationship within the Department. However, a stronger showing of disruption is needed when the speech deals more directly with issues of public concern, and the disruption must be real and not imagined. Connick v. Myers, supra, at 152, 103 S.Ct. at 1692-3; Rankin v. McPherson, supra, 107 S.Ct. at 2899-2900; McKinley v. City of Eloy, supra at 1115; Allen v. Scribner, supra at 432. See, Thomas v. Carpenter, supra, at 830-31.

a. The issues addressed by Thomas during his campaign and in his campaign literature are matters of public concern.

Thomas alleges that Carpenter's conclusion that the campaign activities of Thomas caused the Sheriff to distrust and lack confidence in Thomas is based upon

various public statements Thomas made during his campaign for Sheriff which questioned Carpenter's management and commitment to the Sheriff's Department. (CR 15; Complaint ¶¶13, 25).

Thomas attached to the second amended complaint and incorporated by reference examples of the campaign literature that was circulated in conjunction with his campaign for Sheriff. (CR 15: 13-18; Complaint, Exhibits 1-5). The literature compares the various capabilities of the incumbent with Thomas on issues concerning management of the Sheriff's Department and commitment to the Sheriff's Department. Complaint, Exhibits 1 and 3 are representatives of the campaign literature circulated by Thomas. Exhibits 1 and 3 are set out in their entirety in the Appendix at p. 14a, and p. 15a, infra.

In light of Rankin v. McPherson, supra, Petitioners can not legitimately contend that campaign statements concerning the internal management of the Sheriff's Department, the managerial skills of the incumbent Sheriff, and the incumbent Sheriff's commitment to the Sheriff's Department are not matters of public concern. In Rankin, the Supreme Court held the following statement addressed a matter of public concern: "[I]f they go for him again, I hope they get him." The quoted statement was made in response to the Plaintiff being advised by a co-worker of the attempt to assassinate President Reagan. Id., 107 S.Ct. at 2895. The Supreme Court held the statement in Rankin addressed a matter of public concern; the statement was made in the context of discussing the policies of

President Reagan's administration. Therefore, the statement was protected by the First Amendment. Id., 107 S.Ct. at 2897. Clearly, the statements at issue in the present case questioning the managerial style and commitment of the Sheriff to his department involve matters of public concern.

In the present matter, the Ninth Circuit determined the content of Thomas' speech was to challenge Carpenter's commitment to the Sheriff's department and his competence in running an efficient law enforcement agency. Thomas v. Carpenter, supra at 830. The Court cited with approval a similar case, McKinley v. City of Elroy, supra, in which the Ninth Circuit concluded that: "the competency of the police force is surely a matter of great public concern." Id.

The Court in Thomas continues by finding that the form of the speech at issue in this case was literature decimated widely throughout the County. Id. The Court finds "of great significance" the fact that the statements at issue occurred "in the context of a political campaign." Id. The Court continues by holding: "the content, form, and context of these statements clearly satisfy the threshold requirement even under the most exacting views of what kind of statements involve matters of public concern." Id.

b. Thomas' first amendment conduct out-weighs any purported disruption in the Sheriff's Department as a result of Thomas' protected conduct.

As previously stated, once it

is determined that the statements at issue address a matter of public concern, the Court balances the interest of the employee as a citizen in commenting upon matters of public concern, and the interest of the public employer in promoting the efficiency of the public service. The employer must establish that the statements at issue disrupted the close working relationship within the department. However, a stronger showing of disruption is needed when the speech deals more directly with issues of public concern, and the disruption must be real and not imagined. (Brief in Opp. at 16-17).

Carpenter contends through Undersheriff Vizzolini and a representative of the County Counsel's office that the campaign activities of Thomas caused the Sheriff to distrust and lack confidence in

Thomas. (CR 15; Complaint ¶¶ 12, 15). Thomas specifically denies that his campaigning for the elected office of Sheriff or any of the public statements made during the campaign regarding Carpenter justify Carpenter's claim of lack of confidence in Thomas, or that Thomas is disloyal and untrustworthy. Thomas continues by alleging that Carpenter has never initiated disciplinary proceedings against Thomas for disloyalty, lack of confidence, untrustworthiness, or the disclosure of information communicated to Thomas during staff meetings. (CR 15; Complaint ¶17).

The expression at issue deals directly with issues of public concern in the context of a political campaign: The various capabilities of the incumbent and Thomas on issues concerning the management

of the Sheriff's Department and commitment to the Sheriff's Department.

Thomas also has sufficiently alleged the lack of disruption his comments caused in the Sheriff's Department. Thomas alleges that he has attended 3 staff meetings between the re-election of Carpenter in June of 1986 and September 25, 1987, the date Thomas was informed of his exclusion from attending future department staff meetings. The last department staff meetings Thomas attended was also attended by the Sheriff. Thomas has also attended in excess of 100 staff meetings. (CR 15; Complaint ¶¶ 9, 10).

Thomas alleges that he has attended Departmental manual revision meetings before when he was assigned to the Special Investigation Bureau. (CR 15; Complaint ¶20). Thomas alleges that the

Department manual meetings are attended by Lieutenants for the purpose of proposing to the division Commanders changes in the Sheriff's Departments manual on various policies and procedures. The Commanders present the proposed changes with any modifications they make to the Sheriff. (CR 15; Complaint ¶20).

Finally, Thomas alleges that on March 23, 1988, Thomas participated as an evaluator in training exercises by the Sheriff's Department high-risk entry team. Thomas had previously supervised the team for 7 years. Thomas participated in the training exercise with the knowledge and consent of his Commander, Captain DeFoe. Carpenter directed through Captain Marchbanks that Thomas was no longer permitted to participate as an evaluator of any training exercises by the team. (CR

15; Complaint ¶24).

Clearly, Thomas is being excluded from activities that he has performed or participated in the past without any type of disruption. Thomas is being excluded from meetings where there is no indication of disruption at this stage in the present action.

The Ninth Circuit rejects Carpenter's argument that safety concerns tip the balance in Carpenter's favor. Id. at 831. The Ninth Circuit states in this regard: "Here, the clear import of Thomas' allegations is that his campaign against Carpenter did not impede his ability to perform his job or interfere with the safety responsibilities of the department. Simply stated, then, Carpenter cannot use the disruption exception '"as a pre-text for stifling legitimate speech or

penalizing [Thomas' expression of] unpopular views.'" [Citation] Id. at 831.

2. The protected activities of Thomas were a motivating factor in the adverse personnel decisions alleged in the complaint.

The Supreme Court has ruled that the public employee only has to show that his constitutionally protected expression was a substantial and motivating factor in the employers adverse decision or conduct. Mt. Healthy City Board of Education v. Doyle, supra at 287, 97 S.Ct. at 576; Allen v. Scribner, supra at 433.

In the present matter, the Ninth Circuit found that: "Carpenter does not challenge Thomas' allegations that the 'substantial' or 'motivating' factor of his

decisions banning him from certain duties was because of Thomas' candidacy for Sheriff." Id. at 830.

3. The adverse personnel decisions would not have been taken absent the protected conduct of Thomas.

County has the burden of establishing as an affirmative defense that the adverse personnel actions would have been taken against Thomas in the absence of the protected conduct. Mt. Healthy City Board of Education v. Doyle, supra at 287, 97 S.Ct. at 576.

Thomas has alleged that Carpenter has never initiated disciplinary proceedings against Thomas for disloyalty, untrustworthiness, or lack of confidence. (CR 15; Complaint ¶17). Thomas has alleged

that he has attended in excess of one hundred (100) of the departmental staff meetings that he is presently excluded from attending. (CR 15; Complaint ¶¶ 8,9). Furthermore, Thomas has alleged that he attended three (3) departmental staff meetings subsequent to the election and prior to his exclusion from the departmental staff meetings. (CR 15; Complaint ¶10).

Thomas alleges that he has attended departmental manual revision meetings in the past when he was assigned to the Special Investigations Bureau. These meetings occurred prior to Thomas' exclusion from the departmental manual revision meeting subsequent to the election. (CR 15; Complaint ¶¶ 20,6). Finally, Thomas alleges that he supervised the department's high-risk entry team for 7

years prior to his exclusion on March 23, 1988 as an evaluator in training exercises of the team. (CR 15; Complaint ¶24).

B. The Allegedly Conflicting Decisions are Distinguishable on the Facts and the Law.

The opinion of the Ninth Circuit in this matter is fully consistant with the First Amendment cases from this Court. The cases from other circuits which Petitioners contend conflict with the Ninth Circuit's opinion in this case are distinguishable.

As the Court observed in Connick v. Myers, supra at 142, 103 S.Ct. at 1687: "For at least fifteen years, it has been settled that a State cannot condition public employment on a basis that infringes the employees' constitutionally protected interest and freedom of expression. [Citations]."

It is true that Thomas has not suffered a loss of pay as a result of the retaliatory conduct of Carpenter. However, Thomas does allege that he has lost promotional opportunities within the department and promotional and latteral opportunities with other law enforcement agencies in California. (Complaint ¶28; CR 15).

Although the First Amendment employment cases decided by this Court have generally involved dismissals, the Ninth Circuit was correct in discussing a note in Elrod v. Burns, supra at 359 n. 13, 96 S.Ct. at 2683 n. 13. The Court in Thomas states: "conduct used to discourage the existence of first amendment freedoms 'need not be particularly great in border defined that rights have been violated'; for example, '[r]ights are infringed both where

the government finds a person a penny for being a republican and where it witholds the grant of a penny for the same reason.'" Thomas v. Carpenter, supra.

Moreover, at least one circuit recognizes that the Supreme Court has never "[S]uggested that a public employee may receive some lesser form of penalty for what she said when the First Amendment prohibits the government from discharging the employee for that speech. [footnote ommitted]." American Postal Workers Union etc. v. United States Postal Service 830 F.2d 294, 312 (D.C. Cir. 1987).

The decision in Thomas is consistent with at least three other cases from the Ninth Circuit in which the focus of the Court was on retaliation for the exercise of First Amendment activities.

The type of adverse personnel actions suffered by Thomas as a result of his protected expressions and conduct are substantially similar to Johnston v. Koppes 850 F.2d 594 (9th Cir. 1988), and Allen v. Scribner, supra, and identical to Anderson v. Central Point School District 746 F.2d 505 (9th Cir. 1984). The failure to assign Thomas to particular employment duties in retaliation for Thomas' protected activities and expression is identical to the facts in Anderson. Both Thomas and Anderson were refused assignments because of their activities, statements, and conduct which are protected by the First Amendment. The facts in Johnston and Allen are substantially similar to those in Thomas. Allen, Johnston, and the present action all involve transfers from one assignment to another in retaliation for

the exercise of the First Amendment conduct. Johnston, Allen, and Anderson all make it very clear that a viable §1983 action for violation of First Amendment rights is not dependent upon the transfer or failure to assign resulting in a loss of salary, seniority, or other benefits. "Government cannot punish its employees for exercising rights guaranteed them by the Federal Constitution." Johnston v. Koppes, supra at 596. Thomas has sufficiently alleged that he has suffered general damages as a result of the conduct of Carpenter. (CR 15; Complaint ¶29). Thus, Thomas has a viable §1983 claim irrespective of any actual loss of pay.

Petitioners contend the opinion in this case conflicts with Bennis v. Gable 823 F.2d 723 (3rd Cir. 1987); Terry v. Cook 866 F.2d 373 (11th Cir. 1989); Tanner v.

McCall 625 F.2d 1183 (5th Cir. 1980); and Joyner v. Lancaster 815 F.2d 20 (4th Cir. 1987), cert. den. 484 U.S. 830 (1987). The cases are distinguishable in that each of the employees in the four cases enjoyed no civil service protection in the positions from which they were either removed or not reappointed.

In Bennis, the district court's opinion clearly establishes that the Mayor had the authority under the civil service rules to demote the plaintiffs to patrolman without cause. Bennis v. Gable 604 F.Supp. 244, 249 (E.D. Pa. 1984). Under the civil service rules at issue, demotions did not have to be made in conformance with the civil service act. In the event of a demotion, as in Bennis, the employee was returned to his position as a police officer. Id. at 248-49.

In Terry v. Cook, supra, the Elrod/Branti analysis was applied to a newly elected sheriff's failure to reappoint the chief deputy and deputy sheriffs and non-deputy sheriff employees who had been appointed by the defeated sheriff. The case involved non-civil service employees who must reapply for re-employment when a new sheriff is elected. Id. at 378.

In Tanner v. McCall, supra, the newly elected sheriff, a Republican, did not reappoint employees of the sheriff's department who had supported his opponent, the former sheriff. Under Florida law, sheriff deputies are appointed by the sheriff; the sheriff has absolute control over the selection and retention of deputies. Id. at 1186. The Court applied the Elrod/Branti analysis to determine

whether the new sheriff was motivated by an intent to discriminate' against Plaintiffs because of their support for the prior sheriff.

In Joyner v. Lancaster, supra, the district court finds that Joyner worked at the pleasure of the sheriff; therefore, the plaintiff in Joyner had no civil service protection in his job as a captain. Joyner v. Lancaster 553 F.Supp. 809, 816 (M.D.N.C. 1982).

In the present action Thomas enjoys civil service protection in his position as a lieutenant for the department. Unlike the Plaintiffs in Bennis, Terry, Tanner, and Joyner, Thomas is protected by County's civil service rules from retaliation. See, Argument II A 2, supra. Political loyalty is the antithesis of a civil service system. See Argument II B, supra.

Joyner is distinguishable from Thomas for another reason. Actual disruption was established in Joyner. Joyner had only two superiors, the sheriff and a major. Joyner vigorously campaigned for the sheriff's opponent primarily to improve his own promotional opportunities. The Court found that Joyner's political activities created disruption and antagonism within the department and enhanced the threat to the job security of the other employees. For these reasons, Joyner's dismissal was affirmed. 815 F.2d at 24.

II. The Ninth Circuit Mistakenly Concludes that Political Loyalty is a Permissable Consideration in Determining Whether a Public Employee Covered by a Civil Service System can be Subjected to Adverse Personnel Action in Retaliation for the Employee's Campaign Activities Against his Supervisor.

Thomas presented the following argument concerning the applicability of political loyalty to civil service employees in general, and Thomas in particular, in a Cross-Petition mailed on January 8, 1990. No docket number has been assigned to this case. Thomas restates generally the argument in the event a Cross-Petition is not required.

The Ninth Circuit applies Elrod and Branti to permit Petitioners to show during

the course of the litigation "that Thomas' political loyalty is essential to the affective performance of the tasks removed from his list of responsibilities." Id. at 832. The court permits political loyalty to be a consideration after first recognizing that Elrod and Branti are not directly on point because the election at issue is non-partisan. Id. at 831.

Respondent believes the Court in Thomas mistakenly permits political loyalty to be a factor in determining whether Thomas' expression was protected by the First Amendment. The Ninth Circuit over looks a critical distinction between this case and the political loyalty cases: Thomas enjoys civil service protection which prohibits political loyalty to be a factor in determining the constitutionality of Thomas' expression.

Furthermore, the political patronage cases are distinguishable for an additional reason. Carpenter has expressed his intention not to run for re-election as Sheriff; Carpenter intends to endorse Undersheriff Vizzolini. (CR 15; Complaint ¶19).

A. The Political Affiliation Cases of Elrod and Branti are Inapplicable to Civil Service Employees.

1. The office of sheriff is non-partisan in California.

In the present matter, it should be emphasized that the Ninth Circuit found the elected office of Santa Barbara County Sheriff to be non-partisan. Id. at 831. Thus, the political patronage or affiliation cases of Elrod and Branti are

distinguishable. The Elrod and Branti cases discuss the circumstances under which one political party can discharge or otherwise discipline non-civil service employees of the other political party when there is a change in the political affiliation of the department head.

In Elrod, the Sheriff of Cook County, a Republican, was replaced by Richard Elrod, a Democrat. Elrod discharged a number of non-civil service employees in the Sheriff's department because they were Republicans pursuant to the past practice in the Sheriff's department. Similarly, Branti involved a review of the dismissal of assistant public defenders solely because they were Republicans by a newly appointed public defender who was a Democrat. The individuals dismissed by the newly

appointed public defender were assistant public defenders who served at the pleasure of the public defender.

In California, the office of Sheriff is non-partisan. The Officers of a County include the Sheriff. (Gov. Code §24000(b).)[3] In Santa Barbara County, the Sheriff is elected. (Gov. Code §24009(a).)[4] Pursuant to the provisions of Article II, Section 6 of the California Constitution, all County offices are non-partisan, and political parties are prohibited from endorsing, supporting, or opposing any candidate for a non-partisan office.[5]

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[3] Government Code §24000(b) is set forth in the Appendix at p. 5a, infra.

[4] Gov. Code §24009(a) is set forth in the Appendix at p. 5a, infra.

[5] Calif. Const. Art.II, §6 is set forth in the Appendix at p. 3a, infra.

2. Thomas is protected from retaliation or discrimination for political affiliations pursuant to local and state enactments.

As previously stated, Elrod and Branti involve the dismissal of non-civil service employees for political affiliation. In the present matter, relevant provisions of the Santa Barbara County Code and California statutes prohibit Carpenter from retaliating or discriminating against Thomas for his political affiliations in campaigning for the elected office of Sheriff.

County Code §27-21 extends to employees of the County the benefits of a civil service system previously enjoyed only by those in the Sheriff's department.

County Code §27-21 prohibits discrimination in any type of personnel action because of political opinions or affiliations. County Code §27-21 further prohibits the political fortunes of elected officers from affecting the continuance of employment of civil service employees or their promotions.[6] Furthermore, County Code §27-30 prohibits favoritism or discrimination against employees due to political affiliations or other non-merit factors.[7]

Moreover, unlike the circumstances in Elrod and Branti, California statutes prohibit discrimination or retaliation against an individual seeking election for

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[6] County Code §27-21 is set forth in the Appendix at p. 7a, infra.

[7] County Code §27-30 is set forth in the Appendix at p. 11a, infra.

a public office. See, California Labor Code §§1101[8] and 1102[9], and California Government Code §§3302(a),[10] 3203,[11] and 3202(a).[12]

Carpenter's second in command, the Undersheriff, does not enjoy the protections of the civil service system. As the assistant department head, the Undersheriff is specifically excluded from the County's civil service system pursuant

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[8] California Labor Code §1101 is set forth in the Appendix at p. 6a, infra.

[9] California Labor Code §1102 is set forth in the Appendix at p. 6a, infra.

[10] California Government Code §3302(a) is set forth in the Appendix at p. 5a, infra.

[11] California Government Code §3203 is set forth in the Appendix at p. 4a, infra.

[12] California Government Code §3202(a) is set forth in the Appendix at p. 4a, infra.

to County Code §27-25.[13] The Court is requested to take judicial notice of this County Code section pursuant to Rule 201, Federal Rules of Evidence. Thus, political loyalty or affiliation is addressed by the County's civil service system by excluding from its coverage the undersheriff, the assistant department head in the sheriff's department.

3. Thomas is not a policy maker or confidential employee within the meaning of Elrod and Branti.

In Elrod, the Court held that a non-civil service employee who is not a policy maker cannot be terminated solely on the

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[13] The relevant provisions of County Code §27-25 are set forth in the Appendix at p. 10a, infra.

grounds of political affiliation. Such terminations, the Supreme Court reasoned, "severely restrict political belief and association." Id. at 372, 96 S.Ct. at 2689. Elrod was superceded by the broader formulation of the Court in the majority opinion in Branti. In Branti, the Court changed the focus to whether the public employer can demonstrate that party affiliation is an appropriate requirement to effectively perform one's job. The Court stated in Branti as follows:

> "In sum, the ultimate inquiry is not whether the label 'policy maker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate

requirement for the effective performance of the public office involved." Id. at 518, 100 S.Ct. at 1295.

The Thomas complaint alleges that the purpose of the departmental staff meetings is the dissemination of information to the division commanders by the executive staff. The meetings are normally attended by the Sheriff, the Undersheriff, two Assistant Sheriffs, and the five Captains. The Captains return from the meetings and brief the lieutenants on their content. Lieutenants attend the department staff meetings in the absence of the Captain. Confidential or sensitive matters are normally handled outside of the staff meetings. (CR 15; Complaint ¶8).

Thomas alleges that he was excluded from representing the custody division in

the department manual revision meetings. Thomas alleges that the department manual revision meetings are attended by lieutenants for the purpose proposing to the Division Commanders changes in the Department's manual on various policy and procedures. The Commanders submit the proposals with modifications to the Sheriff. (CR 15; Complaint ¶20). Thomas also alleges he was prohibited from participating as an evaluator in the training exercises of the high risk entry team, a group he supervised for 7 years. (CR 15; Complaint ¶24).

The district court was requested to take judicial notice of the relevant provisions of the Sheriff's Department manual of policy and discipline (hereinafter "policy") in ruling on the Motion to Dismiss. The policies were also

summarized and incorporated by reference in their entirety in the complaint. (CR 15: 6-7, 19-24).

The department policies show that Thomas, as a Lieutenant in the department, has the second lowest rank in the department. Above a Lieutenant in the hierarchy of the Department's chain of command are the ranks of Captain, Inspector, Undersheriff, and Sheriff. Policy §1.206.1.[14].

Policy §§1.206-211 defines the authority of Lieutenants. A lieutenant has a very limited role in the Sheriff's department. Lieutenants and sergeants are a "sub-executive". (CR 19: 42, 44; Policy

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[14] Santa Barbara County Policy §1.206.1 is set forth in the Appendix on p. 12a, infra.

§§1.206.1, 1.207,[15] and 1.211.1)[16]. A sub-executive "[C]arr[ies] out department policies and administer[s] and supervise[s] the work of various sub-divisions." (CR 19:44, Policy §1.211.0). Thomas alleges that a Lieutenant, just as any other employee of the Department, can only recommend changes in policy and procedures through the chain of command. (CR 15; Complaint ¶18).

Given the limited and well defined role of a Sheriff's department lieutenant, the Defendants cannot demonstrate "party affiliation" is an appropriate requirement for the effective performance of the public

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[15] Santa Barbara County Policy §1.207 is set forth in the Appendix on p.13a, infra.

[16] Santa Barbara County Policy §1.211.1 is set forth in the Appendix on p. 15a, infra.

office involved: lieutenant. More importantly, any attempt by Petitioners to make such a demonstration of the need for "party affiliation" is in direct conflict with County Code §§27-21 and 27-30.

B. Political loyalty or patronage is the antithesis of a civil service system.

In United States Civil Service Commission v. National Association of Letter Carriers 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973), this Court discusses in extensive detail the history of political patronage and the creation of the federal civil service system with particular application to the prohibitions in §9a of the Hatch Act. The Hatch Act, at 5 U.S.C. §7324(a)(2), prohibits federal employees from taking "an active part in political management or in political

campaigns. This Court states that "until 1871 when a civil service for federal employees was established, federal employees served in a "[s]poil system under which federal employees came and went, depending on party service and changing administrations, rather than meritorious performance..." Id. at 557-58, 93 S.Ct. 2886-87. Thus, the federal civil service system was designed to replace a "spoils" system with employment decisions based upon merit.

Similarly, the California Supreme Court has consistently held that the purpose of a civil service system is "[T]o abolish the so-called spoils system, and to increase the efficiency of the service by assuring the employees of continuance in office regardless of what party may then be in power." Allen v. McKinley (1941) 18

Cal.2d. 697, 705 (discussing the purpose of the civil service system for the City and County of San Francisco); Steen v. Board of Civil Service Commissioners (1945) 26 Cal.2d 716, 722 (describing the same purpose for the civil service system in the City of Los Angeles); and Skelly v. State Personnel Board (1975) 15 Cal.3d 194, 201 (describing the same purpose for the state civil service system).

In Santa Barbara, County Code §27-21 prohibits discrimination in any type of personnel action because of political opinions or affiliations. County Code §27-21 further prohibits the political fortunes of elected officers from affecting the continuance of employment of civil service employees or their promotions.[17]

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[17] County Code §27-21 is set forth in the Appendix at p. 7a, infra.

Furthermore, County Code §27-30 prohibits favoritism or discrimination against employees due to political affiliations or other non-merit factors.[18]

Thomas is a civil service employee. Thomas alleges in his complaint that he has permanent status in the county's classified civil service system. (CR 15; Complaint ¶2). Thus, Thomas enjoys the protection of County Code §§27-21 and 27-30.

C. Extending political loyalty to civil service employees conflicts with Branti, Elrod, and Most Cases from the other Circuits.

The inapplicability of political loyalty in considering whether a civil service employee's speech and conduct is

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[18] County Code §27-30 is set forth in the Appendix at p. 11a, infra.

protected by the First Amendment is best shown by the fact that the Branti and Elrod analysis or political loyalty has been considered by most courts applicable only in the context of non-civil service employees.[19] Political loyalty or patronage is the antithesis of a civil service system. See discussion II B infra. The leading cases of Branti and Elrod both consider political affiliation in the context of non-civil service employees. In Branti, the plaintiffs were two assistant public defenders who served at the pleasure of the public defender. Thus, the plaintiffs did not enjoy civil service protection and could be removed the

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[19] The Ninth Circuit recognizes that civil service employees are protected from political patronage dismissals. Laguana v. Guam Visitors Bureau 725 F.2d 519, 520 (9th Cir. 1984).

pleasure of the public defender. Id. at 509, 100 S.Ct. at 1290. In Elrod, the plaintiffs were employees of the sheriff's department when this Court described to be: "[N]on-civil service employees and, therefore, not covered by any statute, ordinance, or regulation protecting them from arbitrary discharge." Id. at 350, 96 S.Ct. at 2678.

Although the following summary is not intended to be exhaustive, the cases reflect the approach in most circuits to determine whether political loyalty or the Elrod/Branti analysis is a permissable consideration in analyzing the conduct or speech of public employees. The cases show that the Elrod/Branti analysis or political loyalty has been applied to civil service employees only one other time by the Seventh Circuit in Shondel v. McDermott 775

F.2d 859 (7th Cir. 1985). However, the inapplicability of considerations of political loyalty to civil service employees was not at issue in Shondel.

The research to date also indicates that there are apparently two cases where the Elrod/Branti analysis has been applied to non-civil service employees who nevertheless had a property interest in their employment relationship and who could only be discharged for cause: Brown v. Trench 787 F.2d 167 (3rd Cir. 1986) and Shakman v. Democratic Organization of Cook County 722 F.2d 1307 (7th Cir. 1983), cert. den. 104 S.Ct. 279 (1983).

The following cases arranged by circuit all involve circumstances under which political loyalty has been found to be an appropriate consideration in employment matters involving non-civil

service employees. The following cases are discussed in greater detail in the cross-petition. Jimenez Fuentes v. Torres Gaztambide 807 F.2d 236 (1st Cir. 1986) (en banc) cert. den. 481 U.S. 1014 (1987); Lieberman v. Reisman 857 F.2d 896 (2nd Cir. 1988); Laskaris v. Thornburgh 733 F.2d 260 (3rd Cir. 1984); Horn v. Kean 796 F.2d 668 (3rd Cir. 1986) (en banc); Furlong v. Gudknecht 808 F.2d 233 (3rd Cir. 1986); Bennis v. Gable 823 F.2d 723 (3rd Cir. 1987), as described in Bennis v. Gable 604 F.Supp. 244, 249 (E.D. PA 1984); Brown v. Trench 787 F.2d 167 (3rd Cir. 1986); Joyner v. Lancaster 815 F.2d 20 (4th Cir. 1987), cert. den. 484 U.S. 830 (1987), as described in Joyner v. Lancaster 553 F.Supp. 809, 816 (M.D.N.C. 1982); Barrett v. Thomas 649 F.2d 1193 (5th Cir. 1981); Tanner v. McCall 625 F.2d 1183 (5th Cir.

1980); Balogh v. Sharron 855 F.2d 356 (6th Cir. 1988), as described in Balogh v. Sharron 666 F.Supp. 987, 988 (E.D. Mich. 1987); Shakman v. Democratic Organization of Cook County 722 F.2d 1307 (7th Cir. 1983), cert. den. 104 S.Ct. 279 (1983); Rutan v. Republic Party of Illinois 848 F.2d 1396 (7th Cir. 1988), as described in Rutan v. Rebublican Party of Illinois 641 F.Supp. 249, 257-58 (C.D. Ill. 1986); Horton v. Taylor 767 F.2d 471 (8th Cir. 1985); Barnes v. Bosley 745 F.2d 501 (8th Cir. 1984); Ray v. City of Leeds 837 F.2d 1542 (11th Cir. 1988); Terry v. Cook 866 F.2d 373 (11th Cir. 1989); and Hall v. Ford 856 F.2d 255 (D.C. Cir. 1988).

Therefore, the Ninth Circuit's opinion in Thomas conflicts with this court's opinions in Elrod and Branti and apparently all but the Seventh Circuit in

permitting political loyalty to be a proper consideration in determining whether a civil service employees' speech and conduct are protected by the First Amendment. As previously stated political loyalty is the antithesis of a civil service system.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari be denied.

DATED: January 17, 1990
Newport Beach, CA

Respectfully submitted,

SILVER, GOLDWASSER & SHAEFFER
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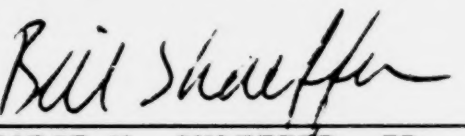
GEORGE W. SHAEFFER, JR.

By 
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APPENDIX

FEDERAL

Title 5 U.S.C. §7324 provides:

"(a) An employee in an Executive agency or an individual employed by the government of the District of Columbia may not -

". . .

"(2) take an active part in political management or in political campaigns. "For the purpose of this subsection, the phrase 'an active part in political management or in political campaigns' means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President."

CALIFORNIA

California Constitution Article II §6(a),(b):

"(a) All judicial, school, county, and city offices shall be nonpartisan.

(b) No political party or party central committee may endorse, support, or oppose a candidate for nonpartisan office."

California Government Code §3202(a):

"(a) Local Agency means a county, city, city and county, political subdivision, district other than a school district, or municipal corporation. Officers and employees of a given local agency include officers and employees of any other local agency whose principal duties consist of providing services to the given local agency. "

California Government Code §3203:

"An undersheriff in a general law county retains his position as undersheriff when he discharges the duties of the vacant office of sheriff pursuant to §24105 or when he becomes a candidate for the office of sheriff for the next term even though he is defeated at the polls."

California Government Code §3302(a) provides:

"Except as otherwise provided by law, or whenever on duty or in uniform, no public safety officer shall be prohibited from engaging, or be coerced or required to engage, in political activity."

California Government Code §24000(a), (b):

"The offices of a county are:

(a) A district attorney.

(b) A sheriff."

California Government Code §24009(a):

"(a) Except as provided in subdivision (b), the county offices to be elected by the people are the treasurer, county clerk, auditor, sheriff, tax collector, district attorney, recorder, assessor, public administrator, and coroner."

California Labor Code §1101:

"No employer shall make, adopt or enforce any rule, regulation, or policy: [¶] (a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office. [¶] (b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees."

California Labor Code §1102 provides:

"No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity."

COUNTY OF SANTA BARBARA

Santa Barbara County Code §27-21:

"This amendment to article II is adopted in order to extend to the employees of the county and of the judicial districts in the county, generally, the benefits of the civil service system formerly covering only the sheriff's office of the county, with certain amendments thereto and exclusions therefrom. This amendment is adopted pursuant to the provisions of part 2 of

division 4 of title 30 of the Government Code of the state (sections 31100 to 31115) and any amendments and successors thereto.

The basic purpose of the civil service system established hereby is to establish and maintain a fair and equitable employment relationship between the county and its employees which will promote and increase efficiency and economy in county service.

The primary objective is to fill each position with the best qualified person available and to ensure that fair, equitable and competent promotion procedures are an essential part thereof. The political fortunes of elective officers shall not affect the continuance in employment of county civil service employees nor their promotions. Promotions to a higher position shall be made promptly

as vacancies occur, and as employees qualify for such promotions by merit, fitness and capable performance.

Tenure of employment is subject to good behavior, efficiency necessity for performance of particular public work and appropriations of public funds. Arbitrary or capricious dismissals or other disciplinary actions affecting county civil service employees are prohibited. All suspensions, demotions and dismissals shall be subject to such reviews and hearings as shall guarantee due process to all employees concerned.

Positions shall be filed (except as otherwise provided) on the basis of merit and fitness ascertained through practical, competitive examinations. Positions involving comparable duties and responsibilities shall be similarly

classified and compensated. Discrimination against any person in recruitment, examination, appointment, training, promotion, retention, or any other personnel action, because of political or religious opinions or affiliations or because of race, national origin, or other non-merit factors will be prohibited. The regulations will include appropriate provisions for appeals in cases of alleged discrimination.

Elected officers, county employees occupying supervisorial positions, and the civil service commission shall perform their duties and carry out their responsibilities according to the spirit and the letter of this article, so as to give the general public of the county good, honest, efficient and economical government." (Ord.No. 11-3-70, §2).

Santa Barbara County Code §27-25(a)(1)(5):

"(a) All employees of the county shall be included in the civil service system hereby adopted and also called the classified service except that the following are exempt from the provisions of this article.

(1) All elected county officers.

. . .

(5) Any appointive department head and all assistant department heads; provided, however, that all department heads and assistant department heads shall remain subject to the provisions relative to recruiting and selection. As assistant department head is hereby defined as the person or persons who are in charge of any county department in the absence of the department head.

Santa Barbara County Code §27-30:

"No person in the classified service or seeking admission thereto shall be appointed, promoted, reduced or removed, or in any way favored or discriminated against because of his race, creed, color, political affiliations, national origin, irrelevant physical handicaps or other non-merit factors. No person shall be subject to favor or discrimination against him or her because of his or her sex, but certain employment positions may be made eligible only for males or only for females where peculiar requirements of such positions reasonably limit such employees to either the male or the female sex, as the case may be. Persons alleging discrimination prohibited by this section may appeal to the civil service commission as provided by the rules." (11-3-70, §2).

Santa Barbara Sheriff Policy §1.206.1:

".1 The order or rank in the Sheriff's Department shall be:

Sheriff

Undersheriff

Inspector

Captain

Lieutenant

Sergeant

Santa Barbara Sheriff Policy §1.207:

".1 The Sheriff is the chief administrator and executive officer of the Department. Upon him rests final responsibility for determining office policies, together with full responsibility for the complete discharge of all duties imposed on him by law.

.2 As chief executive officer, the

Sheriff must officially sanction and approve any changes in office organization before the changes can be put into effect. The detailed methods of directing and controlling specific functions of the Department or of its divisions and subdivisions may be developed by subordinate executive officers, but the original direction and final approval and adoption of the guiding principles rests with the Sheriff.

.3 In his capacity as chief executive and administrative head of the Department, the Sheriff maintains administrative control and governs office activity through major executives who also act in an advisory capacity in matters of general office policies and procedures. These major executives are;

a. Undersheriff

b. All Division Commanders

.4 The above major executives are ranked as shown for purposes of administrative control. In the absence of the Sheriff, they will assume control of the entire Sheriff's Department in the order given, any one to assume command when all those named before him are absent, and as directed by the Sheriff."

Santa Barbara Sheriff Policy §1.211.1:

".1 Sub-Executives, having disciplinary and supervisory powers, carry out department policies and administer and supervise the work of various subdivisions. These officers are subordinate to those named previously, and are ranked as shown in Paragraph 1.206.1 of this procedural order.

Exhibit "1" to Complaint:

"A law enforcement position isn't a 9-to-5 punch-in/punch out sort of job. [¶] Law enforcement is a unique microcosm... a family relationship... a feeling that they should all be in this together, working together, and being able to depend on that network. [¶] And it's important in this kind of tight-knit unit to have a leader you can trust and depend on. This "family" needs to know their leader is behind them, working daily. [¶] What happens when a sheriff's heart is no longer really in his work, when he's bored with the job and when he's off pursuing other political ambitions? [¶] You loose. [¶] Because when a Sheriff loses touch with his department, he's lost the most important element in the public safety program-commitment. And the morale of the men and

women in public safety is essential to their performance. [¶] Recognizing this, the deputies and corrections officers thought carefully when they voted in a recent endorsement ballot for their next leader... our next sheriff. The majority saw it was time for a change, and selected Lt. Jim Thomas for Sheriff. [¶] It was clear Jim Thomas had the energy and commitment to tighten the department and rebuild staff morale. It was clear Lt. Thomas had the progressive administrative skills to bring the Sheriff's Department in the 21st century." (CR 15:13)

Exhibit "3" to Complaint:

"The Sheriff's job has changed a lot since the hustling cattle thief days of the Old West. [¶] Today's Sheriff needs to do more than swing a pistol. Today's Sheriff

needs specific skills in planning, management, and enforcement. [¶] The Sheriff now needs to be a good administrator because he'll oversee a budget of $21 million. [¶] The Sheriff now needs to be a strong manager - he'll have a staff of 455, with 227 sworn law enforcement officers. [¶] The Sheriff's job now requires someone with tactical planning and enforcement skills - to rid our county of narcotic trafficking and violent crime. [¶] When selecting your next sheriff, you'll want to sit up and take notice of Lt. Jim Thomas. [¶] Lieutenant Thomas was handpicked by the Justice Department to attend their Command College, a graduate program in Future's management and Public Administration. [¶] Look at Jim's experience in applying private sector know-how to clean up

unwieldy government bureaucracy. As Commander of the Special Investigations Bureau he came in 31% under budget. [¶] Look to Thomas's management skills - as an able, energetic administrator, he has commitment and respect of the staff. That's why the majority of the voting deputy sheriffs and corrections officers endorse Jim Thomas for their next Sheriff. [¶] In conclusion, select a sheriff with capabilities, commitment, and concern for the community... select Lieutenant Jim Thomas for Sheriff." (CR 15:16)